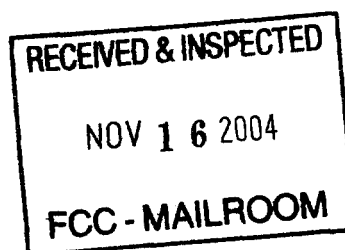


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November 12, 2004

DOCKET FILE COPY ORIGINAL

Federal Communications Commission
OFFICE OF THE SECRETARY
445 – 12TH Street, SW
Washington, DC 20554
VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

**Re: In the matter of Request for Review by RelComm, Inc. of Decision of
Universal Service Administrator
CC Docket No. 02-6, SLD Decision 1022916 and 1023492
Year Six E-Rate, Billed Entity #123420: Atlantic City Board of Education
Our file 13,586-1**

To Whom It May Concern:

Please be advised this firm represents the interests of the Atlantic City Board of Education [ACBOE] with regard to the above referenced matter. Enclosed herewith please find the following:

- (X) **Response of ACBOE to RelComm, Inc.'s Opposition to Petition of ACBOE (O & 4)**
- (X) **Proof of Service (O & 4)**

Respectfully submitted,

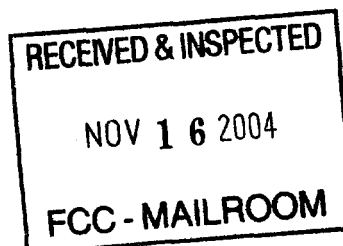
Michael J. Blee, for
Rovillard & Blee, L.L.C.

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MJB:kw

cc: J. Philip Kirchner, Esquire (via facsimile and Federal Express Overnight Delivery)
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**Before the
Federal Communications Commission**

**Schools and Libraries Universal Service
Mechanism**

**In the Matter of Request for Review by
RelComm, Inc. of the Decision of the
Universal Administrator**

CC Docket No. 02-6

SLD Decision 1022916 and 1023492

**Billed Entry No. 123420
Atlantic City Board of Education**

**RESPONSE OF ATLANTIC CITY BOARD OF EDUCATION
TO RELCOMM, INC.'S OPPOSITION TO
PETITION OF ATLANTIC CITY BOARD OF EDUCATION**

On October 14, 2004, the Atlantic City Board of Education ("ACBOE") petitioned for waiver of the rules governing the review and consideration of the Request for Review filed by RelComm, Inc. against the ACBOE's funding commitment decisions letter ("FCDL") on two funding requests (also referred to as "Funding Request Number" or "FRN"). The first request asked for waiver of 47 C.F.R. §54.721(d) and 47 C.F.R. 1.45(c), which provides only a fifteen (15) day time period for filing a reply to RelComm, Inc.'s Request for Review of the Universal Service Administrator's Decision on two funding requests. Specifically, ACBOE requested permission for the Commission to accept its Reply out of time. In addition, ACBOE requested

the Commission to permit discount disbursements to be made on the funding requests under review, which requires waiver of 47 C.F.R. §54.725.

On October 22, 2004, RelComm, Inc. ("RelComm") filed a pleading styled as an Opposition to the Petition for Waiver, and as a substantive Opposition to the October 14, 2004 Reply pursuant to 47 C.F.R. 1.45(c). Not surprisingly, RelComm opposed both of ACBOE's rule waiver requests. In both instances, however, RelComm's position is misplaced because of its incorrect interpretation and application of FCC rules. Moreover, RelComm's substantive pleading, styled as a "Reply" to ACBOE's October 14, 2004 Reply should be stricken because it is not permitted under FCC rules.

Request for Waiver of 47 C.F.R. §54.721(d) and §1.45

RelComm mistakenly claims ACBOE is not a third party as described in 47 C.F.R. §54.721(d) because ACBOE's actions are the subject of RelComm's Request for Review. RelComm goes on to claim that "ACBOE's Response is actually an 'Opposition' to the Request for Review, which must have been filed within ten (10) days of RelComm's Request, pursuant to 47 C.F.R. §145(b) as incorporated by 47 C.F.R. §54.721(a)." Each of RelComm's claims is incorrect.

By definition, RelComm's Request for Review has sought FCC review of a decision of the Universal Service Administrator to approve funding commitments to the ACBOE. As such, the action under review is whether the Administrator's decision should be affirmed – which ACBOE believes is the correct result because none of the allegations in RelComm's Request for Review are meritorious or indicate any violations of E-rate program rules. In this situation, therefore, although ACBOE is the applicant-beneficiary of the Universal Service Administrator's

Funding Commitment Decisions Letter ("FCDL") and FRNs under review, ACBOE is properly classified as a third party. The party against whom the Request for Review was filed is the Universal Service Administrator, not the ACBOE.

Next, RelComm also mistakenly cites to a non-existent rule, 47 C.F.R. §145(b), which it claims is incorporated by 47 C.F.R. §54.721(a), for the proposition that ACBOE's response should have filed as an Opposition. Even if RelComm intended to cite to section 1.45(b), rather than section 145(b), a review of that regulation and section 54.721(a) reveal absolutely no mention of a third party's filing of an opposition to a request for review of a decision of the Universal Service Administrator. Contrary to RelComm's representation, there is no express mention of section 1.45(b) in section 54.721(a).

Further, a review of the Commission's Order in which section 54.721 was promulgated indicates that ACBOE correctly interpreted and complied with the Commission's rule. In *Changes to the Board of Directors of the National Exchange Carrier Association, Inc. and Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, *Third Report and Order in CC Docket No. 97-21*, *Fourth Order on Reconsideration in CC Docket No. 97-21* and *Eighth Order on Reconsideration in CC Docket No. 96-45*, FCC No. 98-306 (released November 20, 1998), the Commission stated:

We agree with commenters that affected parties should have the **right to appeal USAC division, committee, and Board decisions** directly to the Commission.

...

To facilitate prompt resolution by the Commission of appeals of USAC decisions, we also adopt specific filing requirements for such petitions. The appellant must state specifically its interest in the matter presented for review. The appellant also must provide the Commission with a full statement of relevant, material facts with supporting affidavits and documentation. In addition, the appellant must state concisely the question presented for review, with reference, where appropriate, to the relevant Commission rule, Commission order, or statutory

provision. The appellant also must state the relief sought and the relevant statutory or regulatory provision pursuant to which such relief is sought. **If an appellant alleges prohibited conduct by a third party, the appellant shall serve a copy of the appeal on such third party, who shall have an opportunity to file an opposition.**¹⁹⁸ Similarly, appellants shall serve on USAC a copy of the appeal of a USAC decision filed with the Commission. **We encourage USAC to file comments setting forth USAC's position on the issues raised in the appeal.** We believe that USAC's comments may aid the Commission in understanding the nature of the disputed issues and facilitate a timely resolution of the matter.

Id. at ¶¶ 66, 71 (emphasis added).

Footnote 198 stated, "Parties shall adhere to the time periods for filing oppositions and replies set forth in 47 C.F.R. § 1.45." Thus, the text of this Order seems to indicate that a third party's response should be styled as an opposition to the request for review, as RelComm argued. Review of the text of the regulation, however, indicates otherwise. The regulation, section 54.721(a), is *silent* about a third party's filing of an opposition to a request for review. Rather, the rule states that a third party may file a **response**, within the time frame applicable to the filing of replies. Typically, a reply is filed within five days of the filing of an opposition, and an opposition must be filed within 10 days of filing of a petition, pursuant to 47 C.F.R. §1.45. Consequently, ACBOE's interpretation of the rules is correct, that the original deadline for filing its response was 15 days.

The Commission's regulations only expressly contemplate the filing of pleadings by three entities: an aggrieved party that seeks review of a decision of the administrator¹⁹⁸; the Universal Service Administrator; and, a third party. The only possible classification that ACBOE meets is that of a third party.

¹⁹⁸ In its reply filed as a companion pleading today, ACBOE refutes the notion that RelComm, Inc. is an aggrieved party entitled to file the instant Request for Review.

Moreover, the rules clearly do not permit or contemplate that RelComm may file any further reply to ACBOE's response. Neither Section 54.721 or 1.45 allow for the filing of any further pleadings after a third party such as ACBOE files its response to a request for review. For this reason, ACBOE moves to strike RelComm's reply. In the alternative, ACBOE requests leave to file a further Reply to RelComm's October 22 pleading.

RelComm's claim that ACBOE did not provide good cause in support of its waiver petition is equally groundless. As ACBOE explained in its October 14 petition, RelComm filed 161 pages of documents in support of its Request for Review, including an affidavit of Michael Shea, replete with factual claims, which required careful review by not only ACBOE, but also ALEMAR Consulting. As RelComm fully is aware, ALEMAR Consulting is a named defendant in the companion civil litigation that RelComm initiated, and also is the target of RelComm's claims of impropriety. Rather than burden the Commission with two separate responses, the parties conferred and prepared a joint response – which took additional time to prepare and coordinate.

RelComm certainly cannot legitimately dispute the fact that the ongoing pretrial discovery, including numerous depositions during September and October, in the directly related civil litigation proceeding, has required a considerable expenditure of time. ACBOE was required to focus its resources on the civil litigation. To suggest that ACBOE did not need additional time to prepare its response to RelComm's massive 161 page pleading is patently unfair and unfounded. These reasons do in fact constitute good cause for the Commission's waiver of its rules.

The cases cited by RelComm are completely inapposite to ACBOE's request for waiver of the time frame for filing its response. See RelComm Opposition at 5. Neither case involved a petition for waiver of the deadline for filing a responsive pleading to a request for review of a

decision of the Universal Service Administrator. Rather, each of those cases addressed a waiver of the deadline for filing an *initial* request for review of the decision of the Universal Service Administrator. The critical difference is that in those situations, the aggrieved party failed to meet the appeal deadline; in this situation, however, the request for review has been filed and the ACBOE response provides further record development and will enable the Commission to sift through the numerous claims and accusations that RelComm has made against ACBOE.

This is not the typical procedural posture of a typical appeal of a decision of the Universal Service Administrator. Typically, an applicant seeking to reverse a denial of funding by the Administrator files an appeal. In the present case, the appeal has been filed not by an applicant, but by a service provider claiming to be an aggrieved party, in which the service provider seeks to overturn a decision of the Administrator to approve funding.

It would be highly prejudicial to ACBOE if the Commission were to disregard its Response and confine its review to RelComm's one-sided and incomplete rendition of events. While RelComm tries to elevate form over substance in objecting to ACBOE's Response, RelComm has not alleged – because it cannot -- that it will suffer any prejudice by virtue of the Commission's approval of ACBOE's waiver request.

For these reasons, the ACBOE requests that RelComm's Opposition to 47 C.F.R. §54.721(d) be dismissed, and the Commission should find good cause for waiving this rule, and accept ACBOE's response as being timely filed.

Request for Waiver of 47 C.F.R. §54.725

RelComm's primary objection against ACBOE's request to deny discount payments to ACBOE while this request for review is pending is premised on RelComm's claim that notwithstanding SLD's exhaustive review of all aspects of ACBOE's competitive procurement during Funding Year 6 as part of SLD's Selective Review examination of the FRNs at issue, ACBOE has committed some program infraction that will be unearthed during this appeal. RelComm contends that *it* would be prejudiced if the Commission took note of the fact that the SLD did in fact extensively review the Year 6 competitive procurement as part of its review of the FRNs before approving funding. See RelComm response at 6-7. In other words, RelComm would be prejudiced unless the reality of this case is ignored. Simply because the Commission's standard of review in this proceeding is *de novo* does not make, as RelComm suggests, that it must ignore the fact that SLD already conducted an extensive review of all aspects of ACBOE's competitive procurement. ACBOE urges the Commission to consider this important factor in weighing whether Section 54.725 may be waived.

RelComm incorrectly claims that the SLD's selective review only looked at the successful procurement awarded to MTG and did not consider all bids, since SLD did not contact RelComm directly to discuss the ACBOE Form 471 application. A facial review of the Item 22 Selective Review document request, which is posted on the SLD's web site and attached hereto as Exhibit 1, clearly requests that *all* documents relating to ACBOE's competitive procurement – including *all* bids received and evaluation materials –must be submitted to SLD (which ACBOE did). In order to confirm whether ACBOE selected the most cost-effective vendor, SLD was required to review *all* bids received in response to ACBOE's Form 470 including RelComm's. Simply because SLD did not contact RelComm to discuss

ACBOE's pending Form 471 application – which SLD was not obliged to do under any circumstances – does not give rise to RelComm's claim that somehow SLD failed to detect a program rule infraction that RelComm seeks to bring to light in its request for review. Indeed, RelComm knows full well that it has a very uphill battle in this Request for Review because of the very extensive examination that SLD performed while these FRNs were under review, and because the breadth and depth of SLD's review included all aspects of ACBOE's competitive procurement.

As ACBOE explained in its initial Petition for Waiver, it is highly unfair that RelComm's filing of a request for review – regardless of its lack of merit and regardless of how repetitive its allegations are – automatically precludes the SLD from paying invoices on the FRNs at issue. RelComm is already pursuing legal recourse of its breach of contract claims against ACBOE in civil litigation. There is nothing more to be gained here other than causing direct harm to ACBOE by virtue of filing the instant Request for Review. ACBOE is willing to provide reasonable security to the Commission to buttress its offer to serve as the guarantor of any payments disbursed on the FRNs under review.

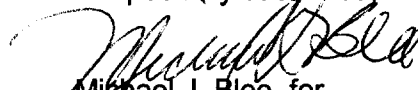
RelComm is showing the depth of its duplicitous motives in opposing this request for waiver. RelComm will suffer no harm in the event that the Commission approves this waiver. The time period for providing the services at issue for Funding Year 6 has expired. Even if RelComm is successful in its appeal – which ACBOE steadfastly predicts will not occur – the funds committed to MTG will not somehow be transferred to RelComm. Indeed, in light of the passage of time, RelComm has absolutely no claim to the discount money associated with these FRNs. In the event that RelComm would prevail, the net result would be that the FRNs would be denied, and no funds would be disbursed on these FRNs. Particularly in light of the

Commission's new red light rules that apply to E-rate applicants and service providers alike, there are more than sufficient protections in place to guard against any claims of waste, fraud and abuse that RelComm tries to make in this case.

CONCLUSION

For these reasons, the ACBOE requests that RelComm's Opposition to waiving 47 C.F.R. §54.725 be dismissed and the Commission should find good cause and waive section 54.725.

Respectfully submitted,



Michael J. Blee, for
Rovillard & Blee, L.L.C.

MJB:kw

cc: J. Philip Kirchner, Esquire (via facsimile and Federal Express Overnight Delivery)
Ralph Kelly, Esquire (via facsimile and First Class Mail)
Gino F. Santori, Esquire (via facsimile and First Class Mail)
Deborah Weinstein, Esquire (via facsimile and First Class Mail)
Schools and Library Division (via First Class Mail)
Fredrick P. Nickles, Superintendent of Schools (via First Class Mail)
Donna Haye, Assistant Superintendent of Schools (via First Class Mail)
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**Before the
Federal Communications Commission**

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Mechanism**

**In the Matter of Request for Review by
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Universal Administrator**

CC Docket No. 02-6

SLD Decision 1022916 and 1023492

**Billed Entry No. 123420
Atlantic City Board of Education**

PROOF OF SERVICE

1. On November 12, 2004, I, the undersigned, personally served an original and four (4) copies of the within Response of Atlantic City Board of Education to RelComm, Inc.'s Opposition to Petition of Atlantic City Board of Education and Proof of Service to **Federal Communications Commission**, Office of the Secretary, 445 – 12th Street, SW, Washington, DC, 20554 via Federal Express Overnight Delivery.
2. On November 12, 2004, I, the undersigned, personally served one (1) copy of the within Response of Atlantic City Board of Education to RelComm, Inc.'s Opposition to Petition of Atlantic City Board of Education and Proof of Service to **J. Phillip Kirchner, Esquire**. FLASTER GREENBERG, P.C., 1810 Chapel Road, West Cherry Hill, New Jersey 08002, via facsimile and Federal Express Overnight Delivery.
3. On November 12, 2004, I, the undersigned, personally served one (1) copy of the Response of Atlantic City Board of Education to RelComm, Inc.'s Opposition to Petition of Atlantic City Board of Education and Proof of Service to **Schools and Library Division**, Box 125 – Correspondence Unit, 80 South Jefferson Road, Whippany, NJ 07981, via First Class Mail.
4. On November 12, 2004, I, the undersigned, personally served one (1) copy of the within Response of Atlantic City Board of Education to RelComm, Inc.'s Opposition


to Petition of Atlantic City Board of Education and Proof of Service to **Ralph Kelly, Esquire**, 41 Grove Street, Haddonfield, New Jersey 08033, via First Class Mail.

5. On November 12, 2004, I, the undersigned, personally served one (1) copy of the within Response of Atlantic City Board of Education to RelComm, Inc.'s Opposition to Petition of Atlantic City Board of Education and Proof of Service to **Gino F. Santori, Esquire**, JACOBS & BARBONE, 1125 Pacific Avenue, Atlantic City, New Jersey 0840, via First Class Mail.
6. On November 12, 2004, I, the undersigned, personally served one (1) copy of the within Response of Atlantic City Board of Education to RelComm, Inc.'s Opposition to Petition of Atlantic City Board of Education and Proof of Service to **Deborah Weinstein, Esquire**, THE WEINSTEIN FIRM, 225 West Germantown Pike, Suite 204, Plymouth Meeting, PA 19462-1429, via First Class Mail.

I HEREBY CERTIFY that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 11/12/04

By:


Mary Catherine Wessler, Legal Assistant
ROVILLARD & BLEE, L.L.C.